STATE OF MICHIGAN

COURT OF APPEALS

LA SALLE BANK, N.A., as Trustee for MLMI TRUST SERIES 2006-HE3,

Plaintiff-Appellee,

v

JULIE KRSTEV,

Defendant-Appellant,

and

JEFFREY K. OUDING, and LAURIE A. OUDING,

Defendants.

UNPUBLISHED
May 10, 2012

No. 302390
Kalamazoo Circuit Court
LC No. 2009-000633-CH

Before: WHITBECK, P.J., and SAWYER and HOEKSTRA, JJ.

PER CURIAM.

In this quiet title and reformation action, defendant Julie Krstev appeals as of right the trial court's order granting summary disposition pursuant to MCR 2.116(C)(10) in favor of plaintiff LaSalle Bank, N.A. Because we conclude that Krstev failed to demonstrate any genuine issue of material fact in regard to LaSalle's claims, we affirm.

The property involved in this case was purchased by Jeffrey and Laurie Ouding in May 1998. The Oudings partitioned the property into two parcels, which have been described as "parcel A" and "parcel B" throughout this litigation. Parcel A is 10 acres and parcel B is 22 acres; parcel A and parcel B together make up the entire property. In October 2005, the Oudings conveyed the property to Krstev by warranty deed. Despite the Oudings' intention to convey the entire property, the warranty deed described only parcel B of the property.[1]

[1] Title was quieted in Krstev and the deed was reformed to reflect conveyance of both parcel A and parcel B after Jeffry Ouding entered into a consent order quieting title in Krstev and a

In April 2006, Krstev entered into a mortgage in favor of Mortgage Electronic Registration Systems, Inc., as nominee for lender Senderra Funding, LLC. The mortgage was recorded in May 2006. Despite the parties' intent to encumber only the 10 acres described as parcel A, the mortgage described the encumbered property as both parcels A and B, and an additional parcel of property not owned by Krstev referred to as "parcel C." The mortgage was assigned in favor of LaSalle pursuant to a Corporate Assignment of Mortgage, and the assignment was recorded on August 27, 2009. The assignment of the mortgage contained the same erroneous description of the encumbered property as the mortgage.

After it was assigned the mortgage, LaSalle discovered the error in the warranty deed conveying the property to Krstev and the error in the mortgage and assignment. In December 2009, LaSalle filed a complaint to quiet title in real property and for reformation of the warranty deed and the mortgage. LaSalle did not seek money damages, attorney fees, or other costs. LaSalle's complaint requested only the entry of an order or judgment of reformation to correct the errors in the deed and the mortgage.

Krstev filed an answer in propria persona to the complaint on March 22, 2010, and she filed an amended answer on April 5, 2010. Krstev's answer and amended answer denied the bulk of LaSalle's claims and brought up fraud in the execution of the mortgage and lack of standing. On April 8, 2010, Krstev filed a motion for summary disposition in propria persona. In her motion she argued that LaSalle failed to offer "proof of authority to stand as a plaintiff," and stated that the "alleged note" was timely canceled and that the mortgage was unsecured. Krstev claimed that she should be refunded all her money. Krstev cited mostly federal law regarding rescission and fraud in support of her motion. The bulk of her arguments were in regard to individuals and entities that were involved in the execution of the mortgage and were not parties to the lawsuit.

LaSalle responded to Krstev's motion and stated that it did not understand why Krstev opposed its lawsuit as Krstev would benefit from a judicial order transferring ownership of the entire property to her and the reformation of the mortgage would clarify that the mortgage does not encumber as much property as stated. A hearing on Krstev's motion was held on May 17, 2010. After hearing arguments from both parties, the trial court denied Krstev's motion for summary disposition and the case proceeded.

On November 16, 2010, LaSalle moved for summary disposition pursuant to MCR 2.116(C)(10). LaSalle argued that there was no question of material fact in regard to the validity of LaSalle's mortgage encumbering the 10 acre parcel of property known as parcel A. LaSalle requested that the trial court reform the mortgage and the assignment to reflect the parties' intention that the mortgage encumber only parcel A. LaSalle further requested the trial court to remove or discharge the mortgage as an encumbrance upon parcel B and the real property identified in the mortgage instrument as parcel C. LaSalle noted that its position was not

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default order quieting title in Krstev was entered in regard to Laurie Ouding. The trial court's order granting summary disposition in favor of LaSalle did not reference the quiet title issue or the deed's reformation. Accordingly, the quiet title action and the deed reformation are not at issue on appeal.

contrary to Krstev's based on her representations that the mortgage was meant to encumber only parcel A.

On December 20, 2010, the trial court held a hearing regarding LaSalle's motion for summary disposition. Krstev was represented by an attorney at the hearing. Krstev's argument in opposition to LaSalle's motion was primarily focused on the alleged fraud and misrepresentation committed by several non-parties to the lawsuit involved in the execution of the mortgage. Krstev did not argue that the parties' original intent was not to encumber only parcel A, and actually affirmed that the original intention was to encumber only parcel A when directly asked about it by the trial court.

After hearing arguments from both parties, the trial court issued its ruling on the record, and granted summary disposition in favor of LaSalle. The trial court noted that the "issue is not about the formation of the mortgage or . . . how the mortgage was arrived at with regard to any fraud or malpractice. This is about what is encumbered by the mortgage. The terms of the mortgage, that's a separate issue." The trial court noted that it had to look at what the complaint alleged and the relief that was requested in the complaint. The trial court concluded that there was no factual dispute in regard to the issues raised in LaSalle's complaint. The trial court granted the motion for summary disposition and addressed the complaint's specific request for relief by stating that the "title is to be quieted with regard to the parcel A issue, and the mortgage itself may be reformed to show what is actually encumbered, which is only the parcel A."

On the same day as the hearing, the trial court entered an order granting LaSalle's motion for summary disposition in conformity with its ruling made on the record. The trial court ordered that the mortgage be "reformed *ab initio* to identify and describe parcel A only and the mortgage shall encumber parcel A only as a valid, first priority mortgage." The order further stated that the assignment of the mortgage "is hereby reformed *ab initio* to identify and describe parcel A only and the assignment shall encumber parcel A only as a valid assignment of the mortgage." Finally, the trial court ordered that the encumbrance upon parcel B and the real property described as parcel C in the mortgage and assignment be removed. The trial court noted that the order was entered without costs or attorney fees awarded to either party, and that it was the final order resolving all remaining claims in the case.

After entry of the December 20, 2010 order, Krstev moved the trial court for reconsideration. On January 11, 2011, the trial court issued an order denying Krstev's motion for reconsideration. The trial court stated that Krstev's motion presented the same issues already ruled upon by the trial court, and that Krstev failed to demonstrate any palpable error. Krstev now appeals the trial court's order granting summary disposition in favor of LaSalle and reforming the mortgage and assignment.

We review a trial court's decision on a motion for summary disposition de novo. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). Summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim based on the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties. *Id.* The evidence is viewed in the light most favorable to the nonmoving party. *Id.* at 567-568. "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving

party is entitled to a judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

Further, this case involves equitable relief in the form of reformation because the trial court reformed the mortgage and assignment in its order granting summary disposition. We review a trial court's factual findings regarding equitable relief for clear error, and whether equitable relief was proper under the facts is a question of law reviewed de novo. *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 197; 747 NW2d 811 (2008).

On appeal, Krstev challenges the validity of the mortgage itself. Specifically, Krstev argues that the mortgage is subject to rescission due to fraud in the execution. Krstev maintains that Aubrey Stewart, the owner and CEO of the licensed mortgage broker CBB, Inc., doing business as Bretlin Home Mortgage, approached her in early 2006 with an offer to refinance her home, and made 11 specific misrepresentations to Krstev to induce her into signing a mortgage contract. Krstev further alleges that the terms of the mortgage contract that she signed were different from the terms of a mortgage contract she was given to read, and that she was led to believe the mortgage she was signing was identical to the mortgage she read. Krstev also claims that the assignment of the mortgage to LaSalle was invalid.

Initially, we consider whether the issues raised by Krstev on appeal were properly preserved for appellate review. The complaint and summary disposition motion filed by LaSalle requested that the trial court correct a scrivener's error and reform the mortgage and the assignment to encumber less property. The issue whether Krstev was defrauded in the execution of the mortgage was never presented to the trial court through appropriate pleadings such as a counterclaim, cross-claim, or third-party claim, nor was it an issue that was considered or ruled upon by the trial court in its order granting summary disposition. Similarly, Krstev did not appropriately challenge the validity of the assignment in the trial court. Because the issues regarding whether Krstev was defrauded and whether the assignment was valid were not appropriately raised or addressed in the trial court, we conclude that they are unpreserved. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999).

"[A]ppellate review is limited to issues actually decided by the trial court." *Heydon v MediaOne*, 275 Mich App 267, 278; 739 NW2d 373 (2007). However, we may review unpreserved issues "if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented." *Smith v Foerster-Bolser Const, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006). We decline to address the issues raised by Krstev because resolution of them would require knowledge of facts not present in the lower court record and both issues involve individuals and entities that were never named parties in the trial court proceedings.

The only issue addressed by the trial court and properly before this Court for review is whether summary disposition pursuant to MCR 2.116(C)(10) was appropriate in regard to LaSalle's request for reformation of the mortgage and assignment to reflect the parties' intention for the mortgage to encumber only the ten acres of property known as parcel A.

The equitable power of reformation is well established. "There is abundant authority for reforming a deed or mortgage which, through error, fails to express the result of the meeting of the minds of the parties, particularly when it is clear that the description fails to embody the clear, undisputed visual standard of the parties." *Etherington v Bailiff*, 334 Mich 543, 552; 55 NW2d 86 (1952). More recently, this Court held that courts have the "power to reform an instrument that does not express the true intent of the parties as a result of fraud, mistake, accident, or surprise." *Johnson Family Ltd Partnership v White Pine Wireless, LLC*, 281 Mich App 364, 372; 761 NW2d 353 (2008). The party seeking reformation must prove that reformation is warranted by "clear and satisfactory" evidence. *Id.* at 379. Additionally, the party asking for reformation must prove that any mistake giving rise to a right to reformation was mutual. *Troff v Boeve*, 354 Mich 593, 596-597; 93 NW2d 311 (1958).

In this case, LaSalle requested reformation and maintained that the parties' originally intended for the mortgage to encumber only ten acres of land and that the mortgage, through mutual mistake in the form of a scrivener's error, encumbered more property than was intended. The assignment contained the same error. Krstev never disputed that the original intent was for the mortgage to encumber only ten acres of property. During the hearing on LaSalle's motion for summary disposition, Krstev specifically affirmed that the parties originally intended that the mortgage encumber only 10 acres of property. Moreover, on appeal, Krstev still does not argue or dispute that the mortgage was originally intended to encumber only 10 acres of property. Therefore, we conclude that summary disposition and reformation of the mortgage was proper because there was no genuine issue of material fact in regard to the original intent of the parties.

Affirmed.

/s/ William C. Whitbeck
/s/ David H. Sawyer
/s/ Joel P. Hoekstra